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No. 59

In the Supreme Court of the United States

OCTOBER TERM, 1957

NORTHERN PACIFIC RAILWAY COMPANY AND NORTHWESTERN IMPROVEMENT COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court (R. 184–192) is reported at 142 F. Supp. 679. The court's oral decision denying appellants' motion for reconsideration (R. 210–215) is not reported.

JURISDICTION

The judgment of the district court was entered on August 31, 1956 (R. 194–198), and the notice of appeal was filed in that court on October 23, 1956 (R. 215–218). Probable jurisdiction was noted on January 21, 1957 (R. 219). The jurisdiction of this Court

is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. 29.

QUESTION PRESENTED

Whether the court below correctly entered summary judgment enjoining appellants from enforcing provisions in contracts for the sale or lease of lands requiring the purchaser or lessee to ship products of the lands over appellants' lines, provided the rates are equal to the rates of competing lines, on the ground that such provisions are unreasonable restraints of trade in violation of Section 1 of the Sherman Act.

STATUTE INVOLVED

Section 1 of the Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. 1, known as the Sherman Act, provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: * * *.

STATEMENT

On May 26, 1949, the United States filed a civil suit, under Section 4 of the Sherman Act, alleging that provisions in deeds and leases of property sold or leased by appellant railroad, and its subsidiary, under which the purchasers or lessees agreed to ship the products produced on such lands by the railroad, as long as the latter's rates did not exceed those of competing lines, constituted unreasonable restraints of trade, in viola-

tion of Section 1 of that Act (R. 1–12).[1] After various pre-trial proceedings, the United States moved for summary judgment. The district court (Judge Boldt) granted the motion in part, and entered a partial final judgment enjoining appellants from violating Section 1 of the Act (R. 194–198).

THE FACTS

The essential facts, as found by the district court and not here disputed,[2] are as follows:

Appellant, Northern Pacific Railway Company ("Northern Pacific"), is a Wisconsin corporation engaged in transporting passengers and freight in interstate commerce (R. 199).[3] It is the successor to Northern Pacific Railroad Company, a railroad chartered by special Act of Congress on July 2, 1864 (R. 199). By that act and Joint Resolution of May 31, 1870, Northern Pacific's predecessor acquired 39,494,391 acres of public land, almost all of which were located in what are now the states where Northern Pacific's

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[1] The complaint also charged that appellants, through the use of such provisions in their deeds and leases, have conspired and combined to monopolize interstate commerce, in violation of Section 2 of the Sherman Act.

[2] The facts are based upon the allegations in the complaint (R. 1–12), insofar as they are admitted in the answer (R. 12–22); the admissions made in appellants' response and supplemental response to appellee's request for admissions under Rule 36 of the Federal Rules of Civil Procedure (R. 78–98, 103–144, 23–77); and statements in the stipulations of the parties (R. 99–102).

[3] Appellant Northwestern Improvement Company ("Northwestern"), a Delaware corporation, is a wholly-owned subsidiary of Northern Pacific. It sells, leases and manages the railroad's lands (R. 199).

lines operate (Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington and Oregon) (R. 200–201). The grant consisted of (1) a 400-foot right of way, and (2) the ten (twenty in territories) nearest alternate sections of non-mineral land on each side of each mile of the railroad line (R. 200).[4]

On May 26, 1949, when this action was brought, appellants had sold much of the granted land. They retained about 2,700,000 acres of land (not including right of way), a substantial part of which is leased to various persons. The lands sold or leased are of many types. Some contain timber, iron ore, coal, oil and gas or other natural resources; others have been used for grazing, agriculture or location of industrial sites (R. 201).

In all land leases and in most timber land sales contracts, as well as in contracts for the sale of timber, "traffic clauses" are customarily inserted by appellants. These clauses require the lessee or grantee to ship over the Northern Pacific's lines all commodities produced on or manufactured from timber on the land, provided that Northern Pacific's rates (and in some leases, its service) equal those of any competing line (R. 201–202). In grazing and most mineral

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[4] The lands thus granted were in two belts, each twenty miles wide in states, and forty in territories, parallel to the right of way. *United States* v. *Northern Pacific Ry. Co.*, 311 U. S. 317, 328. Where such land was unavailable next to the railroad line, alternate sections were granted in two belts lying, respectively, not more than ten and twenty miles beyond the limits of the original grant. In lieu of mineral lands, the carrier could select agricultural lands within 50 miles of the railroad line (R. 200).

leases and in timber land and sales contracts, shipment by Northern Pacific must be made if its rates are equal to those of any competing line (R. 203, 205–207). Iron ore, coal, and oil and gas leases condition such shipment on both rates and services being equal (R. 203–205).[5]

Over the years, appellants have entered into a substantial number of agreements containing these traffic clauses (R. 203–207). At the time of suit in 1949, the following agreements containing traffic clauses were in effect: 1,000 grazing leases covering more than 1,000,000 acres of land; at least 19 oil and gas leases covering 135,000 acres of land; at least 12 coal land leases; at least 16 iron ore leases covering 5,261 acres of land; at least 17 mineral land leases covering 6,810 acres of land; at least 31 timber sales contracts covering 100,585 acres and 1,491,895,995 board feet of timber; at least 72 timber land sales contracts covering 1,244,137 acres containing 6,572,762,000 board feet of timber (R. 203–207).[6]

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[5] The coal and oil and gas leases require routing over Northern Pacific only of all traffic "destined for rail shipment" (R. 203–204). In addition, these leases require all incoming freight to be via Northern Pacific; and the oil and gas leases require delivery of all oil to a pipe line reaching the rails of Northern Pacific where such pipe line is available and a price can be obtained for oil so delivered which is at least equal to the price obtainable for oil delivered to any other pipe line. (*Ibid.*) The timber sales and timber land contracts require the purchaser to make monthly reports to Northern Pacific of shipments under the traffic clause, and to permit the latter to examine the records for the purpose of verifying the reports (R. 206–207).

[6] This amount of timber does not include the particular contract, referred to by appellants (Br. 11–12), the traffic clause in which apparently has expired.

A large portion of the shipments of commodities covered by the traffic clauses has been and is shipped in interstate commerce (R. 202). Alternative means of transportation exist for a substantial part of such commodities, including the railroad lines of the Great Northern Railway Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, numerous motor freight lines, and steamship lines (R. 202–203).

THE OPINION BELOW

In granting judgment, the district court held that "[o]n the established facts all of the traffic clauses in question, excepting those in the industrial (including grain elevator and grain warehouse) leases, are shown to be violative of Section 1 of the Sherman Act under the principles enumerated in the tying cases [decided by the Supreme Court]" (R. 192).[7] Those principles, the trial court stated (R. 187–188), establish a *per se* violation of the Sherman Act where (1) the seller or lessor enjoys market control of the tying commodity, and (2) the amount of interstate commerce in the tied product is not insignificant or insubstantial. The lower court, on the basis of *International Salt Co.* v. *United States*, 332 U. S. 392,

[7] The court noted that the industrial leases grant a use of right-of-way lands and that "[s]uch lands are an integral part of the property devoted to railway operations and are directly related to transportation, the asserted tied commodity" (R. 191). It therefore concluded that a trial was required to determine the factual question whether "the industrial leases involve distinct and separate tied and tying commodities, as held required * * * in *Times-Picayune* v. *United States* * * *" (R. 191–192).

found that appellants had market dominance over the tying commodity (their lands) (R. 189–190), and that the "actual or potential commerce in transportation of commodities from the properties subject to the traffic clauses is very substantial * * *" (R. 191). It accordingly adjudged the traffic clauses unlawful (with the exception of those in the industrial leases), and enjoined appellants from enforcing them or entering into agreements containing them (R. 195–196).

SUMMARY OF ARGUMENT

A. This case presents a tying arrangement whereby rival transportation agencies, even though competing on even terms with appellant Northern Pacific, are foreclosed from the substantial market represented by shippers who have leased or purchased appellants' lands. This Court held in *Times-Picayune* v. *United* States, 345 U. S. 594, that because it is unlawful, *per se,* to foreclose competitors from any substantial market, arrangements tying the sale of one product to the sale of another product or service are banned by Section 1 of the Sherman Act whenever two conditions are established: (1) that the seller has market dominance over the "tying" product; and (2) that a substantial volume of commerce in the "tied" product is restrained. Since the volume of commerce in the "tied" transportation service was concededly substantial, the crucial question here is whether the first criterion was met.

International Salt Co. v. *United States,* 332 U. S. 392, which involved a tying arrangement by means

of which the lessor of a patented salt machine required the lessee to use only its salt in the machines, supports the view that the Government need not establish the absence of competition with respect to the tying product. In *International Salt* this Court, in finding a violation of Section 1 of the Sherman Act, rejected the defendant's argument that summary judgment was improper because it should have been permitted to establish that other competing machines were available to the lessees. Since this Court has explicitly stated that it was irrelevant whether the defendant was dominant in the market of machines for the utilization of salt, the basis of *International Salt* is clearly independent of absence of competition between the patented "tying" article and others. Lessees, who for whatever reason preferred International Salt's unique machines, were forced to deal with the latter, both as to the machine and consequently the "tied" product.

That is also true here. The vendee or lessee of a piece of land has selected that parcel because, for any of a number of objective and perhaps subjective reasons, he believes it to be the one most suitable for him. The uniqueness of the land has been recognized for centuries by the case law governing land transactions, and finds further support in the depositions of a number of lessees who operate under the traffic clause. These lessees testified to the great importance to them of their Northern Pacific land holdings, particularly in filling out or "blocking" their range, or in providing needed water. Thus, appellants' extensive land holdings gave to them the "monopolistic lever-

age" whereby the vendee or lessee, who sought to acquire the particular land parcels owned by appellant, could be coerced into also agreeing to ship the produce of that land over the Northern Pacific's lines. Appellant's contention that it was necessary to determine at the trial their relative position in the various land markets is precisely the argument rejected by this Court in the *International Salt* case.

B. Appellants' several arguments attempting to establish the reasonableness of their traffic clauses are without merit. The proviso in the traffic clauses permitting the lessee to use a competitor's transportation service if its rates are lower than those of Northern Pacific, does not establish effective competition. Nor does the fact that the railroad industry is of a common carrier, regulated nature justify these "tying" restraints. Other transportation agencies competing on even terms as to rates and service are precluded from the substantial market involved, and the existence of the traffic clauses is a powerful deterrent to any competitive effort to reach that market.

C. Not only are appellants' traffic clauses illegal under the principles of the tying cases, but the restraints imposed are unreasonable on their face under settled antitrust concepts. Appellants' obvious aim is to preclude competitors from gaining access to the transportation market represented by their vendees or lessees. No legitimate business aims motivate appellants, nor do the contracts disclose any benefit to vendee or lessee warranting the routing restraint. The traffic clauses thus embody the very vices which

led this Court in *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, and *Associated Press* v. *United States,* 326 U. S. 1, to condemn the restraints there involved as unreasonable on their face.

ARGUMENT

APPELLANTS' TRAFFIC ROUTING CLAUSES CONSTITUTE UNREASONABLE RESTRAINTS OF TRADE IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT

A. THE CONTRACTS FOR THE SALE OR LEASE OF THE LAND CONTAIN ILLEGAL TYING PROVISIONS

1. In *Times-Picayune* v. *United States,* 345 U. S. 594, 608–609, this Court stated that a tying arrangement is illegal under Section 1 of the Sherman Act (1) "[w]hen the seller enjoys a monopolistic position in the market for the 'tying' product," and (2) "if a substantial volume of commerce in the 'tied' product is restrained." Plainly, the second condition of illegality has been met in this case. The district court found (R. 191) that "[a]ctual or potential commerce in transportation of commodities from the properties subject to the traffic clauses is very substantial"—a finding which clearly is correct[8] and which appellants do not seriously challenge.[9]

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[8] See Statement, *supra,* p. 5, showing the substantial volume of land covered by such clauses.

[9] Appellants' suggestion (Br. p. 12) that because the record does not show how much of the standing timber covered by timber land sales remained uncut in 1949, "it cannot be assumed that in 1949 any very large amount of timber land theretofore sold by appellants was affected by these traffic clauses," ignores that fact that appellants sold a large volume of timber land in the mid-1940's (R. 89–90, 93–96).

The issue, therefore, is whether Northern Pacific "enjoys a monopolistic position in the market for the 'tying' product." The district court answered that question affirmatively, on the ground that the "market for the 'tying' product" was the market for Northern Pacific's land and not, as appellants contended, the market for all land in the same area which could have been used for the same purpose. The court concluded that since Northern Pacific admittedly had a monopolistic position in its own land, there was "no genuine issue as to any material fact" requiring a trial and that the Government was entitled to judgment.

Under the rule of *International Salt Co.* v. *United States,* 332 U. S. 392, the district court correctly granted summary judgment in favor of the Government. In that case the salt company leased about 900 patented salt dispensing machines under contracts requiring the lessees to use with the machines only salt purchased from it. Pursuant to such tying arrangements, International in 1944 sold about $500,000 worth of salt for use with the leased machines. The Government challenged these tying arrangements as illegal under both Section 1 of the Sherman Act and Section 3 of the Clayton Act. The district court granted the Government's motion for summary judgment, and this Court (unanimously on the issue of violation) affirmed.

In its appeal to this Court, International Salt pointed out that "[i]t does not follow, of course, that because a machine is patented no machine capable of doing

similar work can be obtained from any one other than the patentee"; and it argued that "[t]his is one of the questions of fact on which defendant was entitled to a trial" (App. Br., No. 46, Oct. Term, 1947, p. 25).[10] To this, the Government replied (Br. pp. 48–49):

> Even if it be assumed, as the trial court did assume (in the absence of anything in the record on the point), that there are other machines available to perform similar functions [footnote omitted], the result would be the same. Obviously the other machines would not be identical with appellant's, inasmuch as appellant's machines are patented. Presumably appellant's lessees chose appellant's machines because they thought them preferable. Once they had made that choice, the tying clause prevents competition between those who would sell salt to them and appellant. * * *

This Court found that summary judgment was authorized, on the ground that "it is unreasonable, *per se* [under Section 1 of the Sherman Act], to foreclose competitors from any substantial market" (p. 396).

In *Standard Oil Co.* v. *United States*, 337 U. S. 293, 305, the Court subsequently set forth the basis of its decision in *International Salt:*

> It was established by pleadings or admissions that defendant was the country's largest

[10] See, also, appellant's reply brief, where it asserted (p. 7) that the fact "that similar products [can] readily be obtained elsewhere * * * will appear in the case at bar, if the appellant is permitted to go to trial."

> producer of salt for industrial purposes, that it owned patents on the leased machines, that about 900 leases were outstanding, and that in 1944 defendant sold about $500,000 worth of salt for use in these machines. *It was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by defendant, and it was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competion.* * * * [Emphasis added.]

International Salt thus did not rest on any finding that the defendant was dominant in the market for all salt dispensing machines. On the contrary, this Court must have assumed, as had the lower court (see 6 F. R. D. 302, 307), that substitute machines for those of the defendant were available.[11] Yet it deemed this consideration irrelevant. Indeed, since the defendant might have controlled only a small portion of the business of supplying salt machines,[12] the basis of the

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[11] This Court, on several occasions, has noted that "most * * * patents * * * give control over only some means of production for which there is a substitute." *Associated Press* v. *United States*, 326 U. S. 1, 17, n. 17; *Standard Oil Co.* v. *United States*, *supra*; at p. 307. Indeed, in the *International Salt* case, the Government pointed out that the Court's opinion in a prior case had indicated the existence of a rival salt dispensing machine (Br., p. 26, note 8). See, also, *International Business Machines Corp.* v. *United States*, 298 U. S. 131, involving a similar tying situation in which a rival firm (Remington Rand) made competitive machines.

[12] Cf. *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764 (C. A. 6), where, in a case which held tie-in sales illegal under Section 3 of the Clayton Act, the patented article constituted only about one-half of one percent of the total volume of the industry.

Court's decision necessarily must have been independent of the absence of competition between the patented article and others. Since no other machine could be exactly like those of International Salt, persons who for whatever reason preferred International Salt's machines were forced to deal with the latter, both as to the machine and as to the "tied" commodity. It is because of the market control of the patented or copyrighted article itself that in these situations the patented or copyrighted article is "the whole * * * of a relevant market" (*Times-Picayune*, at p. 611).[13]

The rationale of *International Salt* is equally applicable to the instant case. While one sack of sugar or bale of cotton or gasoline pump (cf. *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 474) may be much like another, one parcel of land is never identical with another. Land, like a patented or copyrighted article, is inherently unique. For "a specific piece of land is in its nature different from every other piece" (5 Williston on *Contracts*, Sec. 1419 (Rev. ed., 1937)), and "is unique and impossible of duplication by the use of any amount of money" (Restatement of the Law of Contracts, Vol. II, Sec. 360). The purchaser may desire a particular piece of land because of its "locality, character, vicinage, soil,

[13] In *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 157–158, this Court found block-booking of motion picture films to violate Section 1 of the Sherman Act, since "the result is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses" (p. 158).

easements, or accommodations * * * [which] give it a peculiar and special value in the eyes of the purchaser, so that it cannot be replaced by other land of the same precise value, but not having the same precise local conveniences or accommodations." 2 Story *Equity Jurisprudence*, Sec. 1031 (14th ed., 1918). It is for this reason that equity always has granted specific performance of contracts to convey land; because of the uniqueness of land, damages necessarily cannot constitute an adequate remedy for breach of such contract.

Many of appellants' purchasers or lessees came to appellants, rather than to other landowners, because (for whatever reason) they deemed appellants' lands most suitable for them. Thus, depositions of a number of lessees who operate under the traffic clause (which were before the district court when it decided the motion for summary judgment, App. Br. 6) indicate the importance to them of Northern Pacific lands. The uniqueness of such lands to prospective purchasers and lessees was heightened because the alternatively odd-numbered sections of land which Northern Pacific received under its grant from the Government created a checkerboard pattern in the area, and made it important to owners and lessees of adjoining land that they obtain Northern Pacific land in order to "fill out" their own holdings.[14] For these

[14] Appellants took depositions only of its grazing and industrial lessees. The following grazing lessees testified in deposition to the importance to them of their Northern Pacific holdings: McWhorter (pp. 9, 35–36, 46, 62); Dunnett (pp. 4,

reasons, presumably, appellants were able to induce purchasers or lessees, as a condition to obtaining the particular parcels they desired, to give up their normal freedom to select among competing carriers. Appellant's traffic routing clauses thus involve "the essence of illegality in tying agreements," namely, that "a seller exploits his dominant position in one market [land] to expand his empire into the next [transportation]." *Times-Picayune* case, supra, p. 611.

Appellants argue (Br. pp. 19–24), however, that the *International Salt* rule is not applicable unless the tying product is a patented or copyrighted article, and that in non-patent or non-copyright cases it is necessary to show that the seller has a dominant position in the broader market covering all effective substitutes for the tying product—in this case, the particular kind of land covered by the traffic routing clauses. Otherwise, they urge, no "monopolistic leverage" (*Times-Picayune* at p. 611) could be wielded by them, since the buyer could simply turn elsewhere for the particular kind of land he desired.

However, this argument was necessarily rejected in *International Salt*. For if there were alternative salt dispensing machines available, the salt company similarly could not have wielded any "monopolistic

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16–17, 25); Olson (pp. 5–7, 24); Pauly (pp. 4–5, 17); Carey (pp. 3, 13); Denecke (pp. 3, 19–20, 39); Magelssen (pp. 3, 13–14, 16, 18); Woodson (pp. 4, 7–8); Mallett (pp. 5–6, 13); Williamson (pp. 3–4, 8–9); Simpson (p. 8); Haughian (pp. 3–4, 10); Davidson (pp. 3–4, 10); Lange (pp. 3, 10, 16–17); Ulmer (pp. 3–4, 8–10); Brown (p. 4, 16–18); Bradshaw (p. 3, 7–8). In the appendix, we have set out some of the more pertinent statements of these witnesses.

leverage" by virtue of its patent control. The Court in *International Salt*, however, deemed it irrelevant whether there were other substitute products. Thus, the rationale of *International Salt* must have been that the salt company had a "monopolistic leverage" regardless of the presence of competing machines. While it is true that the salt company misused its patents by employing them to foreclose competitors from a substantial market for unpatented products, that fact was immaterial to the question whether the company had "monopolistic leverage" over the tied product.[15] Whether International Salt had a "dominant position" (*Times-Picayune*, p. 611) in the market for the tying product did not depend upon how it used its position.

Many other products, although neither patented nor copyrighted, may also have sufficiently peculiar characteristics so that they can serve as a basis for wielding monopolistic leverage. A particular piece of land is just as unique as a patented product, even though such uniqueness flows from the inherent character of the property rather than its patent protection. And such land, just as the salt machine, does not lose its unique character because of the fact that, if the price is too high or the restrictive conditions too burdensome, there may be substitute products to which a prospective purchaser may turn.

[15] We point out, however, that since most of the lands here involved were obtained by appellants from the Government as an "aid" to railroad construction (R. 200), it would appear to constitute an abuse of such Government grant for appellants to use the land to foreclose competition in another product. Cf. *United States* v. *Union Pacific R. Co.*, 353 U. S. 112, 114.

That the *International Salt* rule is equally applicable to tying cases involving unpatented products is borne out by *Times-Picayune*. For there this Court approved *International Salt* as the case which "wove the strands of past cases into the law's present pattern" (345 U. S. at 608), and it applied "the rule of *International Salt*" (p. 609) in testing the legality of the tying contracts there involved. Although the Court held that the facts there did not bring the case within the rule, the significant facts are that it recognized the rule as the touchstone for determining the legality of tying agreements under the Sherman Act, and that it applied the rule to advertising space, a non-patented and non-copyrighted product. Cf. also *Kansas City Star Co.* v. *United States*, 240 F. 2d 643 (C. A. 8), certiorari denied, 354 U. S. 923. Furthermore, the Court also repeated the view, first expressed in the *Standard Oil* case (337 U. S. at 306), that "[i]n the usual case * * * only [the seller's] control of the supply of the tying device, whether conferred by patent monopoly *or otherwise obtained*, could induce a buyer to enter [a tying contract]" (p. 605, emphasis added)."[18]

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[18] As stated in Lockhart and Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 Harvard Law Review 913, 944–945:

> * * * But in most cases it should not be necessary to determine the precise degree of market control over the controlled product in order to conclude that the tying device has an adverse effect on competition. In the absence of some exceptional situation showing that economic reasons other than market control induced the user or dealer to curtail his freedom, the very existence of the

United States v. *du Pont & Co.*, 351 U. S. 377, upon which appellants rely (Br. 30–31), is not inconsistent with this analysis. There this Court, in defining the relevant market under Section 2 of the Sherman Act, stressed that it was dealing with the question of monopolization under that section, and indicated that the relevant market may be more narrowly defined for other offenses under the Act (pp. 395–396, note 23). Cf., also, *United States* v. *du Pont & Co.*, 353 U. S. 586, 593–595. Thus, while Section 2 does not outlaw monopoly achieved solely through a valid patent, *International Salt* makes it clear that tying agreements based upon such a patent may be unlawful. Here, because of the unique character of the tying product, the relevant market for determining whether appellants have a dominant position over such product is the product itself.

2. Appellants' tying agreements are not saved from illegality because the obligation to ship via Northern Pacific arises only if its rates (and service in some instances)[17] are as favorable as those of competing

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tying arrangement would seem to indicate that the supplier has sufficient market control to force his customer to adhere to the tying arrangement, and thus to lessen competition in the tied product.

[17] The qualifying phrase in the traffic clause in grazing leases, timber sale contracts and contracts for the sale of timber lands refers only to "rates being equal." Appellants attempt to convert this into "rates *and service* being equal" on the ground that the clauses have been thus interpreted. But the language is unambiguous, and the fact that appellants have not fully enforced their rights under the clauses cannot be used to justify the legality of the provisions. *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 457–458; *International Salt Co.* v. *United States*, *supra*, at 398.

transportation services. A similar argument was made and rejected in *International Salt*. There appellant contended that the tying agreements covering its "Lixator" machine were valid "because they provided that if any competitor offered salt of equal grade at a lower price, the lessee should be free to buy in the open market, unless appellant would furnish the salt at an equal price" 332 U. S. at 396). This Court ruled (p. 397, emphasis added), however:

> * * * The "Lixator" provision does, of course, afford a measure of protection to the lessee, but it does not avoid the stifling effect of the agreement on competition. *The appellant had at all times a priority on the business at equal prices:* A competitor would have to undercut appellant's price to have any hope of capturing the market, while appellant could hold that market by merely meeting competition. We do not think this concession relieves the contract of being a restraint of trade, albeit a less harsh one than would result in the absence of such a provision. * * *

Similarly, in the instant case, the effect of appellants' tying agreements is to give them "at all times a priority on the business at equal prices."[18] Indeed,

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[18] Appellants seek to justify their tying agreement on the ground that it is "normal and reasonable for parties dealing with each other to expect reciprocal favors." (Br. 34-35.) But these traffic routing clauses are not "reciprocal favors" granted by shippers in return for other benefits, but restrictive conditions imposed by Northern Pacific in order to give it competitive advantages over other carriers. If, as appellants suggest, shippers normally would give Northern Pacific their business, there would be no need for tying arrangements obligating

the fact that the tying provision applies only if Northern Pacific's rates and service are equal to those of competitors, would make shippers more likely to enter into such contracts, since on their face they would not seem to pose the threat of serious financial injury.

The traffic routing clauses deny shippers the freedom of choice among competing sellers which the antitrust laws are designed to protect; they also deny competing sellers of transportation equal access to the market on the same terms as appellant. It is for these reasons that "tying agreements fare harshly under the laws forbidding restraints of trade" (*Times-Picayune Co.* v. *United States*, 345 U. S. 594, 606), since (p. 605):

> Tying arrangements, we may readily agree, flout the Sherman Act's policy that competition rule the marts of trade. Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take. Yet "[t]ying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California* v. *United States*, 337 U. S. 293,

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them to do so. See *Times-Picayune* case, *supra*, p. 605 ("But any intrinsic superiority of the 'tied' product would convince freely choosing buyers to select it over others, anyway"). The purpose of this suit is to "pry open to competition a market that has been closed by defendants' illegal restraints" (*International Salt* case, p. 401), and to give shippers complete freedom to select their carriers uninhibited by any contractual obligation to favor Northern Pacific.

> 305 (1949) [footnote omitted]. By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the "tied" product's merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the "tied" product would convince freely choosing buyers to select it over others, anyway. Thus "[i]n the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one." *Id.*, at 306. Conversely, the effect on competing sellers attempting to rival the "tied" product is drastic: to the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment; they are effectively excluded from the marketplace.

Appellants contend (Br. pp. 36–37) that the foregoing reasons are inapplicable to the railroad industry. They state that since uniform freight rates must be published and made available to all, the treatment accorded individual shippers does not substantially affect the over-all competitive picture. But the fact that competing carriers may not be able to lower rates to an individual shipper in no way negatives the "stifling effect * * * on competition" of appellants' restrictive agreements. In fact it aggravates it. For unless competitors make a general reduction of rates or improvement in service for all shippers in the area, they

are precluded from obtaining any share of the market for transportation services covered by these routing clauses. Moreover, if they make such a reduction in rates or improvement in services, appellants could automatically retain the business by the simple expedient of matching such improvements. Here, as in *International Salt*, the effect of the tying clauses has been "to foreclose competitors from * * * [a] substantial market" (345 U. S. at 609):[19]

3. Appellants argue (Br. 37–41), that these traffic clauses repeatedly have been judicially upheld as neither in restraint of trade nor otherwise unlawful. But the cases they cite are inapposite to the present issue under the Sherman Act. Several involve construction of state antitrust statutes or the Interstate Commerce Act, while others turn upon the interpreta-

[19] The restraining effect of these traffic clauses is not limited solely to the produce of the lands sold or leased by appellants. It also includes manufactures from such produce, and, in the case of appellants' oil and gas and coal land lessees, all incoming freight destined for use in the territory of which the leased lands are a part (R. 203–207). Indeed, these latter lessees are required to ship via Northern Pacific's lines commodities from *adjacent* lands in which the lessee has an interest (R. 203–204). And even without this contractual restraint, those lessees who have leased even-number sections to "fill out" their grazing, timber or mineral holdings are, practically speaking, required to ship the entire produce or manufactures from these intermingled holdings over Northern Pacific's lines, in view of the difficulty, if not impossibility, of segregating the produce of the Northern Pacific lands from that of others (see, e. g., depositions of Warren Woodson, p. 8; and of Wallace Ulmer, pp. 8, 10). Appellants have even required some timber and other vendees to offer the products of the lands to those manufacturers who agree to ship via Northern Pacific (R. 206).

tion of a single contract in which the routing clause was the moving consideration for unusual acts performed by the other party to the contract. The one pertinent Sherman Act case cited (Br. 38–39), *United States* v. *Reading Co.*, 253 U. S. 26, condemned traffic clauses of the type here involved.[20]

Appellants also rely on the "antiquity" of the traffic clauses and the difficulties encountered by the railroad industry in meeting the competition of truck, water, and pipe lines (Br. 36–37, 41). Neither argument can justify the clear violation here involved.[21] See *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 149–150; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 220–222; *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 344–345 (D. Mass.), affirmed, 347 U. S. 521.

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[20] In the *Reading* case, the Court condemned a series of leases which sought to limit the shipment of coal to specified rail routes (p. 55): "* * * Since this [traffic] covenant was resorted to as a part of the scheme to control the mining and transportation of coal, which is condemned as unlawful in this opinion, the decree on the District Court enjoining the lessors and the other defendants herein from attempting to enforce such covenants will be affirmed." It did sustain one traffic clause where the particular contract provided for reciprocal benefits to the shipper and carrier.

[21] Appellants' reliance on alleged competition difficulties with the trucking and other transportation industries is unwarranted on several other grounds. Many of their routing restrictions antedate the emergence of this new competition, and are equally applicable to other railroads. Although appellants refer to the difficulties in meeting the competition of other transportation forms, they fail to indicate how traffic clauses giving them priority in the business at equal rates will aid them in meeting such competition.

B. THE CONTRACTS INVOLVED IMPOSE AN UNREASONABLE RESTRAINT ON TRADE SINCE THEY DIRECT THE COURSE OF TRADE NOT ON THE BASIS OF COMPETITIVE MERIT BUT BY FORCE OF THE APPELLANTS' OWNERSHIP OF THE LAND

Not only are appellants' traffic clauses illegal under the principles of the tying cases, but the restraints imposed are unreasonable on their face under other settled antitrust concepts.

In *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, 465, this Court held that a scheme which had as its purpose the suppression of competition from the sale of unregistered textiles and copied designs violated the policy of the Sherman Act because, among other things, "it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy." In the light of that purpose and effect, the Court held that the Commission correctly had refused to consider the reasonableness of the methods used to accomplish the unlawful objective. In *Associated Press* v. *United States,* 326 U. S. 1, this Court held that by-laws, which prohibited all AP members from selling news to non-members and granted the members power to impose restrictive conditions upon admission to membership of non-member competitors, were on their face unreasonable restraints of trade, because they were designed to stifle competition in the newspaper publishing field. The Court pointed out (p. 15) that "[w]hile it is true in a very general sense that one can dispose of his property as he pleases, he cannot 'go beyond the exercise of this right, and by contracts

or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.' "

Similarly, in the instant case appellants' "forbidden ends" (*Times-Picayune,* p. 622) patently are to preclude appellants' competitors from gaining access to the transportation market represented by appellants' vendees or lessees, and to prevent shippers from patronizing such competitors. Appellants' traffic clauses therefore "unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade" because they arbitrarily narrow both "the outlets to which * * * [competing carriers] can sell and the sources from which * * * [shippers] can buy." The clauses thus embody the very vices which led this Court in *Fashion Originators' Guild* and *Associated Press* to condemn the restraints there involved as unreasonable on their face. And, unlike *Times-Picayune* (pp. 622–623), no "legitimate business aims" motivate appellants;[22] nor do the contracts disclose any benefit to vendee or lessee which could be regarded as *quid pro quo* for the routing restraint.

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[22] In their summary of argument (Br. 18) appellants make the bald assertion that the primary function of the traffic clauses "is to take the place of solicitation of the traffic of those using appellants' lands * * *." This argument was not advanced below, and is unsupported here; it could be made by every seller in the "tying" situation and, absent some showing of unusual circumstances, does not constitute a "legitimate" business purpose.

The contracts for sale of timber and timber land suffer from a further infirmity. With respect to such products appellants seek to control the choice of transportation facilities by the vendee and, in some timber sales, by his successors and assigns (R. 207), even though all title has passed to the vendee. In addition, some timber contracts control the shipment of other products manufactured from the timber, although appellants never had title to such products (R. 207). This Court has held that a distributor of a trade-marked, copyrighted, or patented article, upon parting with title to his property, may not lawfully limit the price at which or the persons to whom the purchaser may resell. *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 721; *United States* v. *Masonite Corp.*, 316 U. S. 265, 278; *Interstate Circuit* v. *United States*, 306 U. S. 208, 220. We submit that once appellants have parted with title to their property, they are similarly precluded from controlling the purchaser's subsequent choice of facilities by which the products of the land or the timber are to be transported. For, here also, appellants' contracts "* * * unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade." *United States* v. *Bausch & Lomb Co., supra*, at 722.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX

Pertinent Excerpts From Testimony of Deposition Witness

McWhorter (p. 45):

Q. So it would not make much difference whether or not you leased from them [N. P.]?

A. No, I wouldn't say that. I valued those leases.

Q. You said it was a very minor portion.

A. Well, I valued the Northern Pacific leases for the simple reason they were intermingled with my other leases, and you have to have control over the area before you can graze it.

Mallett (p. 13):

Q. Now, you were asked on Direct if this land you leased from the Northern Pacific filled out the block of land altogether that you controlled, is that true?

A. That is true.

Q. And so this Northern Pacific land you leased was pretty important to your range, wasn't it?

A. Well, it just kept from building fences if we could lease it.

Q. Pretty expensive to build fences, isn't it?

A. Yes.

Q. It was important?

A. Yes, it's important because it's important to get a block of land together.

Q. Because it's every other section?

A. Yes.

Magelssen (p. 14):

Q. Now these lands that you leased from the N. P. were pretty important to you and your range, weren't they?

A. Some of them; yes, some of them with water holes. In that county we lease land that will control water and a lot of these N. P. sections controlled water.

Q. In other words, you wouldn't have bought them unless you thought they were important to you?

A. No, it's pretty essential to have water.

Lange (pp. 16–17):

Q. I think the word "intermingled" was used in your direct examination. What do you mean by that? Do you mean that the N. P. land is intermingled with the other?

A. Well, they are odd numbered sections.

Q. That land is important to your home range, is it?

A. Well, all range is important, as the situation is there, and if the N. P. land was out, the Reclamation land would be valueless, and the Reclamation land would be in the same position if the other land was out, the land is divided up that way.

Q. It is so intermingled, that you have to take it, is that it?

A. Yes, you have to have both of them, it is not practical if either one of the leases is out of the picture, one without the other.

Pauly (p. 17):

Q. Now, the lands you leased from the Northern Pacific was very nominal, wasn't it, in comparison?

A. In comparison to what we had? Yes, sir.

Q. But it was intermingled with your land, is that right?

A. Yes, sir.

Q. Was the Northern Pacific land too important to you when you were raising sheep?

A. Well, naturally I wouldn't lease it for the fun of it.

Q. But I am still wondering, since you had a hundred thousand acres, if 15,000 acres was too important?

A. It was, for the simple reason that it's intermingled with other lands, and it's pretty hard to graze one without the other, and to avoid a lot of hard feelings and headaches and the like of that, why we'd lease those sections. * * *

Olson (p. 24):

Q. Now, you testified on direct that this portion of the land you leased from the N. P. was very essential to your home range?

A. Well, I wouldn't have wanted it cut out.

Q. You wouldn't care to have them cut it out; is that it?

A. No, I wouldn't, because it works right in with the rest of the range. It is very essential in that country. Most of the range is very essential for the time when we use it. You start to lamb in the spring, and you have to have the early spring range, and you have to have a little later range, and you have to line that stuff up, oh, sometimes at least the middle of May before you can leave there, and you have to have a lot of range to do it with.

Simpson (p. 8):

Q. You stated that you still had some land under lease from the Northern Pacific and that previous to that you had bought some land from the Northern

Pacific. I would like to know if the land you leased and the lands you bought which you had previously leased from the Northern Pacific was important to your range?

A. Yes, it was.

Q. It helped fill out your range in other words?

A. Yes, sir.

Haughian (p. 10):

Q. Now, this Northern Pacific land that you leased is intermingled with your range pretty much, isn't it?

A. Yes.

Q. It was pretty important that you have that for your range?

A. Yes.

Q. You wouldn't want to go around every other section would you?

A. No, sure it would be important. I think we in the sheep business should have sense enough to know that. * * *

Bradshaw (pp. 7–8):

Q. Now, these Northern Pacific leased lands you stated on direct were intermingled with your home range of the 50,000 acres that you control, are they important to you?

A. Oh, yes, part of the unit.

Q. And if you didn't have those your range would be cut down considerable, wouldn't it?

A. Well, it would be cut down in proportion to the acreage.

Q. It would be kind of confusing if someone else owned those lands intermingled with your range, wouldn't it?

A. Yes, it would.

Q. So, in other words, they are pretty important to you aren't they, those lands that you bought from the—leased from the Northern Pacific now and did lease?

A. Yes.

Woodson (pp. 7–8):

Q. Your Northern Pacific lands are intermingled with your range, and were they intermingled with your range back in the Twenties?

A. Before 1912 was the first time we wintered out there and we had 120 acres of stripped land and gradually after that settlement we acquired more range because we had to keep other fellows from getting it. I never kept the Northern Pacific land separate from the other range at all. Blocked it up as we could.

Q. So the Northern Pacific lands were pretty important to your range as a whole, weren't they?

A. Yes, they were.

Denecke (pp. 19–20, 39):

Q. Now, you stated that these Forest permit lands and N. P. leased lands are intermingled, and that they make one block. Now, if you didn't have this N. P. leased land and only had Forest permit land, you could only graze 1600 sheep, is that right, you wouldn't be able to feed 1800 additional sheep?

A. That's right.

Q. So the N. P. lease is very important to you, isn't it?

A. Yes.

Q. If you didn't have it, it would just cut you more than half?

A. More than half, yes.

* * * * *

Q. * * * This N. P. land was very important to all members of this Madison Valley Grazing Association, wasn't it and isn't it?

A. It is important, yes, and was important at that time.

Williamson (pp. 8–9):

Q. Why did you finally lease it [N. P. land]?

A. Just to protect our holdings.

Q. Because of Homesteaders?

A. If you didn't lease it somebody else would probably come in and lease it and take it away from you and break up your range.

Q. So the Northern Pacific leased land you finally acquired was very important to your range?

A. Yes, that is true.

Q. If you didn't have it you wouldn't have your range because it would be all broken up?

A. That's right.

Dunnett (pp. 16–17):

Q. So you would say that about 500 of those sheep would probably have grazed on the N. P. land; is that right?

A. Well, I couldn't—that would be hard to define that.

Q. I mean, you probably know, raising sheep as long as you have, how many acres of land a sheep will graze over during the summer?

A. Well, what we had on there was only on that particular part probably in the—the Northern Pacific lands lie on the south slope—they wouldn't be there for a month on the lands of the Northern Pacific. It dries out a little early, and then we went higher up, but it was very essential; it was early feed.

Q. And it was very important because it was early feed on the south side?

A. Yes, it was important.

McWhorter (p. 61):

Q. Well, that is correct, under the Act of Congress of 1864, the land was all odd sections; and your intervening lands—put it this way: You spoke of your lands being intermingled. Well, were there some cases where the sections that you had otherwise, adjoined the N. P. sections?

A. Solid blocks of it, in fact, the N. P. sections intermingled only with a minor proportion of my range.

Q. You said you did regard the N. P. lands as important. Just why did you regard the N. P. lands as important?

A. To facilitate grazing on the entire area. It would be very difficult, almost impossible, to graze a block of four sections, for example, if the Northern Pacific owned two of them and someone else owned two of them. It would be very difficult to graze them.

Ulmer (pp. 9–10):

Q. But in your own case you have 48 sections in addition to the 15 or 20 sections you got from the Northern Pacific?

A. Yes, sir, I don't have any.

Q. You did in former years?

A. Yes, sir.

Q. Was that land important to your range?

A. Yes, sir.

Q. Did you buy it to fill out your range?

A. You mean the Northern Pacific land?

Q. Leased land?

A. I bought it because to have security as far as range was concerned. Yes, it was important to me.

Q. And you needed that to graze your sheep on?

A. That's right.

Carey (p. 13):

Q. Now, we talked quite a bit about leases that you had from the N. P. in conjunction with your other lands that you own and lease elsewhere. I would like to ask you: This N. P. land you stated on direct was intermingled with your other property. You think that N. P. land is pretty important to fill out your holdings, isn't it, so to speak?

A. Naturally.

Q. You wouldn't like to see it leased to somebody else or lost to you?

A. No, we wouldn't.

Davidson (p. 10):

Q. Now, you testified on Direct that during all this time the Northern Pacific land was practically either one-half or exceeded one-half of all the land you had under your control?

A. I think it really exceeded more than half of the rest of the land I had.

Q. And then you testified that this was in all one range?

A. Practically, it's stretched out quite a little.

Q. So if the Northern Pacific land exceeded by one-half all the other land you had under your control was that a pretty important part of your range, was this Northern Pacific leased land necessary to you in your business?

A. Yes, it was to hold my range.

Q. You wouldn't have wanted to have that lease wiped right out from under you would you?

A. No, I wouldn't.

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